SHIGENORI ONO

v.

THONG FOO CHING & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-189-1990]
20 JUNE 1991

CONTRACT: *Doctrine of frustration - Misrepresentation - Injunction obtained by 3rd party against party to contract - Effect of - Breach of agreement - Rescission by plaintiff - Whether justified - Failure by defendant to deliver vacant possession - Contracts Act 1950, ss. 40, 52, 57.*

CIVIL PROCEDURE: *Application for summary judgment - Allegation of fraud - Whether element of deceit - Possibility of setting aside injunction - Whether defence to an action - Abandonment of pleadings - Whether allowed - Triable issues.*

The plaintiff entered into a land sale agreement (the LSA) with the 3rd defendant (D3) whereby D3 agreed to sell to the plaintiff the said properties and also entered into a share sale agreement (SSA) with the first and second defendants, D1 and D2 whereby D1 and D2 agreed to sell to the plaintiff the whole of the shared capital of two shares of RM1 each in W. The plaintiff made certain payments under the two agreements. Dewan Bandaraya (DBKL) advised D3 that construction on the said properties must commence prior to 30 April 1990.

On 30 May 1990 the plaintiff was granted a Mareva injunction to restrain the defendants from removing or transferring or otherwise dealing with their assets within the jurisdiction and that this sum does not exceed RM2,806,024.

This injunction was subsequently varied by consent to allow the defendants to withdraw a sum of RM20,000 for living expenses and to pay towards liabilities.

The plaintiff sought declaratory orders that the 2 agreements between him and the defendants were lawfully rescinded by him and that further the plaintiff was entitled to claim a refund of all payments made by him to the 3 defendants in respect of the 2 agreements. He contended that D3 had misrepresented certain facts to him as the property which was the subject of the LSA was subject to a development order and that there was an existing tenancy arrangement with a third party GS, which later obtained an *ex parte* injunction against D3.

The plaintiff claimed summary judgment contending that the defendants' defence was a sham defence, that there was a fundamental breach of the 2 agreements by the defendants or alternatively that the 2 agreements had been avoided by the doctrine of frustration. He also contended that the LSA and the SSA were related to one transaction, that is, the sale of the properties and sale of the shares were interdependent on each other and that there was an orally expressed or implied term that the SSA was subject to the LSA and that it would determine if the LSA should be terminated by reason of the default of D3.

The defendant refuted the plaintiff's assertion that the LSA and SSA were interdependent and related to one transaction. It was further contended that the plaintiffs were precluded from obtaining summary judgment under O. 14 of the Rules of the High Court 1980 since his action is based on an allegation of fraud; the defendant also argued that the plaintiff's application for an O. 14 judgment was premature as at the date of filing the present action

of the plaintiff on 18 April 1980 the completion date of the LSA had not expired. D3 had also applied to set aside the injunction obtained by GS and this was yet to be heard. It was contended that there was a possibility that the injunction would be set aside.

D3 also said that as it was the plaintiff who was giving notice to rescind the LSA, it was the plaintiff who repudiated the said agreement. The defendants also relied on s. 52 of the Contracts Act 1950 to state that the obligation to deliver vacant possession would be postponed indefinitely. By the premature rescission, it was submitted that the plaintiff had unequivocally manifested a complete absence of readiness and willingness to perform which was a crucial element in the concept of anticipatory breach relied on by the plaintiff.

At the hearing, the plaintiff abandoned his claim of fraud based on representations made to him by D1 on D3's behalf.

Held:

[1] In order that a defendant can claim the exception under O. 14 r. 1(2)(b) of the RHC 1980, it must be shown that the claim of the plaintiff based on a charge of fraud must mean "deceit" as espoused in *Derry v. Peek*. The claim by the plaintiffs in their statement of claim that the defendants had failed to disclose the tenancy agreement with GS, and DBKL's development order, cannot be construed as an allegation of fraud within the meaning as laid down in *Derry v. Peek*, in fact, it fortified the plaintiff's claim as to D3's ability to deliver vacant possession.

[2] There is no legal inhibition against the plaintiff's abandonment of his pleadings of misrepresentation as long as he does not attempt to utilise directly or indirectly the misrepresentation to support his case.

[3] The plaintiff cannot be precluded from applying for summary judgment pursuant to O. 14 RHC 1980 in respect of his causes of action based on breaches of the LSA and frustration of the said agreement.

[4] D3 has successfully raised a triable issue as regards the plaintiff's awareness of the development order. Based on the conflicting affidavit evidence, the issue cannot be resolved at this interlocutory stage and must go to trial.

[5] D3 had failed to rebut the existence of the tenancy agreement and purported to rely on a letter which was not produced as evidence; in the circumstances s. 114 of the Evidence Act 1950 would adversely apply against them especially since the plaintiff had managed to produce a copy of the draft tenancy agreement containing all the essential terms of the tenancy which had been signed by GS and their guarantors where it was stated that the said tenancy agreement was irrevocable.

[6] There is equally no doubt that the tenancy agreement entered between D3 and GS was made behind the back of the plaintiff - he knew nothing about it until late March 1990 when a search was made with the Court and the plaintiff was told about the tenancy suit filed by GS and the injunction obtained by them on 12 March 1990 against D3. On receipt of this information the plaintiff therefore instructed his solicitors, to rescind the LSA, as well as the SSA, effective from 10 April 1990.

[7] In entering into the tenancy agreement with GS, D3 had clearly disabled themselves from delivering vacant possession of the properties to the plaintiff while the plaintiff was willing and able to pay the full purchase price. This by itself clearly shows that the plaintiff could not be able to obtain vacant possession of the properties by 18 April 1990. D3 could not be able to obtain vacant possession of the properties by 18 April 1990. D3 could not perform

their obligation under Clasue 2(iii) of the LSA whereas the plaintiff was willing and able to pay the full purchase price by the date of completion.

[8] The injunction obtained by GS had the effect of frustrating the LSA pursuant to s. 57(2) of the Contracts Act 1950. When two parties had entered into a contract to do certain things pursuant to the terms and conditions of the contract and subsequently a third party succeeded in obtaining an injunction against one of the contracting party restraining him from carrying out his fundamental obligation or obligations under the contract, the result is the frustration of the contract and the innocent party to the contract need not perform his contractual obligations.

[9] Although the LSA and SSA were executed on the same date namely 19 January 1990, there is nothing either in the LSA or the SSA to indicate that the two were linked, or that performance of each was interdependent. At this interlocutory stage it is difficult if not impossible to resolve this issue.

[10] The plaintiff has failed to establish a *prima facie* case to support his right to rescind the SSA and therefore is not entitled to summary judgment on that issue.

[Declaration that plaintiff had validly rescinded the LSA; plaintiff not entitled to summary judgment in relation to SSA.]

Cases referred to:
Derry v. Peek [1889] 14 AC 337 ***(cit)***
Barclays Bank Ltd. v. Cole [1967] 2 QB 738 ***(cit)***
Newton Chemical Ltd. & Ors. v. Arsenis [1989] 1 WLR 1297 ***(cit)***
Blue Nile Co. Ltd v. Emery Customs Brokers (S) Pte Ltd. [1990] 2 MLJ 385 ***(dist)***
Caltex Oil (M) Sdn. Bhd. v. Ho Lai Yoke [1964] MLJ 30 ***(dist)***
Universal Cargo Carriers Corporation v. Citati [1957] 1 QB 401 ***(cons)***
Nizam's Jewellery Trust [1980] AIR SC 17 ***(cit)***
Codelta Construction Pty. Ltd. v. State Rail Authoriy of New South Wales [1982] 41 ALR 367 ***(cit)***

Legislation referred to:
Administration of Justice (Miscellaneous Provisions) Act 1933 [UK], s. 6(1)
Contracts Act 1950, ss. 40, 52, 57(2)
Rules of the High Court 1980, O. 14, rr. 1, 2, O. 24, r. 7
Rules of Supreme Court 1965 [UK], O. 14, r. 1(2)
Rules of the Supreme Court 1970 [Sing], O. 14, r. 1(2)(b)

For the plaintiff - Wong Chong Wah (Lee Hock Beng with him); M/s. H.B. Lee & Co.
For the defendants - R.S. Nathan; M/s. Shearn Delamore & Co.

JUDGMENT

Lim Beng Choon J:

This was an application made by the plaintiff on 10 May 1990 by way of summons-in-chambers (encl. 3B) in which he sought leave to enter summary judgment pursuant to O. 14 of the Rules of the High Court (the RHC) against the three defendants based on the following reliefs and claims as set out in his statement of claim. The reliefs sought by the plaintiff were for declaratory orders that the two agreements both dated 19 January 1990 entered by him with the defendants, T.C.C. Holdings Sdn. Bhd., in the first agreement and with the 2nd and 3rd defendants in the second agreement were lawfully rescinded by the plaintiff. Further and in the alternative he claimed that the agreements were void in law and that the plaintiff was entitled to claim a refund of all the payments made by him to the three defendants in respect of the two agreements.

The plaintiff's writ endorsed with his statement of claim was filed on 18 April 1990. He amended his statement of claim on 8 May 1990. The three defendants after entering appearance filed their joint statement of defence on 23 May 1990 (encl. 4). I do not propose to set out the averments made in the plaintiff's statement of claim and the averments set out in the statement of defence because in the written submissions of the Counsel for the plaintiff dated 2 March 1991 he had neatly summarised certain facts that were not disputed and Counsel for the defendants, with certain exceptions, generally agreed to the correctness of those undisputed facts. I shall be able to arrive at a decision based on those facts. If need be I shall refer to certain matters as set out in the pleadings and in the several affidavits filed either in support of the parties' respective cases or in rebutting the opponent's allegations.

On 30 May 1990 the plaintiff applied for a Mareva injunction to restrain the 1st and/or 2nd defendants whether by themselves, their servants etc. from removing from the jurisdiction selling, disposing of, charging, pledging transferring or otherwise howsoever dealing with their assets within the jurisdiction insofar as the same did not exceed the sum of RM2,806,024. In his application the plaintiff named the sources of the assets of the defendants and also asked for an order under O. 24 r. 7 of RHC or inherent jurisdiction of the Court requiring the defendants to disclose the value, nature and whereabouts of all their assets in particular the sum of RM2,806,024 paid to the defendants by the plaintiff. At the *ex parte* hearing of the plaintiff's application for the Mareva injunction on 26 July 1990 I granted an order in terms of his application subject to the usual undertaking to pay damages should subsequently the plaintiff be found to have wrong fully obtained the said injunction.

On 7 August 1990 the defendants applied to set aside the said Mareva injunction and alternatively to vary the said injunction to enable the defendants to draw reasonable living expenses not exceeding such sum as was just in the circumstances but not less than RM5000 per week. They also asked for a reasonable sum to pay such liabilities as were or had been or would be reasonably incurred in the ordinary course of business of the three defendants. By consent the said injunction was varied on 4 September 1990 to allow the defendants to withdraw a sum of RM20,000 per month from their account with the Oriental Bank Berhad Kuala Lumpur.

Reverting to the facts that are not in dispute, they are as follows:

(i) There are two written agreements both dated 19 January 1990 made between the following parties:

(a) An agreement between the plaintiff and the 3rd defendant, T.C.C. Holdings Sdn. Bhd. under which the 3rd defendant agreed to sell and the plaintiff agreed to buy two pieces of properties held under Grant No. 9606 for Lot 437, s. 57 and Grant No. 9607 for Lot 438, s. 57 (the properties) both in the Town of Kuala Lumpur known as No. 82 and 84 Jalan Bukit Bintang Kuala Lumpur (the Land Sale Agreement)

(b) An Agreement between the plaintiff and the 1st and 2nd defendants under which the 1st and 2nd defendants agreed to sell and the plaintiff to purchase the whole of the issued capital of two shares of RM1 each in Win Dollars Sdn. Bhd. (the Share Sale Agreement).

(ii) The Land Sale Agreement between the plaintiff and the 3rd defendant contained *inter alia* the following terms:

(a) Clause 1: In consideration of RM980,000 paid by the plaintiff to the 3rd defendant, the latter agreed to sell the properties at the purchase price of RM4.9 million "free of all encumbrances and with vacant possession."

(b) Clause 2(i): The balance of the purchase price of RM3.92 million would be paid by the plaintiff to M/s A.J. Ariffin, Chong & Harpal (amalgamated with) M/s C.C. Choo & Co. Advocates and solicitors as stakeholders within three months of the date of the agreement, that is, by 18 April 1990. There was, however, a provision for extension of time and this provision reads - "In the event the purchaser shall fail to deposit the said balance of the purchase price with the said solicitors within the time period herein stipulated, the vendor shall upon the request of the purchaser grant the purchaser a further extension of time of one (1) month to deposit the said balance of the purchase price with the said solicitors provided always the purchaser shall pay interest of ten percent (10%) on the balance of the purchase price remaining yet unpaid. (ii) The period of three (3) months and the extension of one (1) month as stated under Clause 2(i) above or such other date as hereinafter agreed upon in writing shall be referred to as the completion date.

(c) Clause 2(iii): Vacant possession of the said property shall be delivered by the vendor to the purchaser upon payment of the balance of the purchase price to the vendor in full.

(d) Clause 5.1: The solicitors named in the Land Sale Agreement was claimed by the plaintiff to be acting for both the plaintiff and the 3rd defendant as common solicitors in the Land Sale Agreement and were authorised to do various things to complete the transactions. But Counsel for the defendants could not agree to this interpretation of the plaintiff of Clause 5.1 and argued that the said solicitors were common solicitors only within the ambit of the specific delineation of duties stated in the Land Sale Agreement. The said solicitors were in all other respect the solicitors for the plaintiff/ purchaser and not the 3rd defendant's solicitors.

(e) Clause 10.4: In consideration of delivery of the properties by the 3rd defendant to the plaintiff, the purchaser would pay a further sum of RM111,624 as compensation to the tenants of the properties.

(f) Clause 10.5: The plaintiff agreed to pay a further sum of RM30,000 towards costs of demolition and clearance of debris to the properties.

(g) Clause 17: Time would be the essence of the contract.

(iii) The Share Sale Agreement contained *inter alia* the following terms:

(a) Clause 1: In consideration of the payment of the purchase price of RM1.6 million by the plaintiff to the 2nd and 3rd defendants, the latter would sell to the former the two shares in WinDollars Sdn. Bhd.

(iv) Pursuant to the two agreements the plaintiff made the following payments:

(a) On 13 January 1990, RM100,000 to the 3rd defendant.

(b) On 17 January 1990 RM2.48 million to the common solicitors. The 2 receipts issued by the common solicitors for RM1.6 million and RM800,000 described the payments as payments towards the purchase price of the properties which is erroneous as can be seen later.

(c) On 16 February 1990 RM141,024 to the 3rd defendant dated 16 February 1990 described the payment as payment under Clause 10(iv) and Clause 10(v) (reproduced above) of the Land Sale Agreement where RM30,000 was payment for demolition and clearance of debris and RM111,024 was payment for delivery of vacant possession.

(d) On 23 January 1990, RM65,000 as commission to one Dato' Hui Guan Lian agent for both parties.

(e) On 25 January 1990, RM20,000 to the common solicitors as legal fees. It will be noted that the first two payments mentioned in (a) and (b) above totalling RM2,580,000 were paid for the following purposes:

1. As deposit under the Land Sale Agreement	RM 980,000
2. As full payment of the purchase price under the Share Sale Agreement	RM1,600,000
Total	RM2,580,000

(v) The properties are subject to a development order by Dewan Bandaraya Kuala Lumpur (DBKL) of 17 March 1989 approving the application made by the 1st defendant to convert the use of the two-storey building from shop to restaurant for the ground floor and residence for the 1st floor. This was followed by a letter by DBKL dated 31 October 1989 informing the 3rd defendant that as the tenant had vacated the properties, construction on the properties must commence on or before 30 April 1990 otherwise action would be taken under s. 19(ix) of the Control of Rent Act 1966 (Revised 1988).

(vi) On 12 March 1990, an *ex parte* injunction was obtained by one Golden Scoope Sdn. Bhd. (Golden Scoope) against the 3rd defendant in Kuala Lumpur High Court Civil Suit No. S6-22-102-90 restraining the 3rd defendant "from selling, disposing, renting transferring or in anyway dealing with" the properties.

(vii) The *ex parte* injunction order was served on the common solicitors on 4 March 1990. The basis upon which Golden Scoope had obtained the *ex parte* injunction was that the 3rd defendant had agreed to grant them a 3-year tenancy of the properties from the date of the issuance of the certificate of fitness for occupation of the premises with an option to renew for a further 3-year period. Golden Scoope in their statement of claim had prayed for specific performance of the tenancy agreement and for damages.

(viii) The 3rd defendant had applied to set aside the *ex parte* injunction. The hearing of the application was fixed for 15 April 1990 but it was postponed to 5 June 1990. Up to 2 March 1991 the injunction still had not been set aside.

(ix) The plaintiff through his solicitors M/s. H.B. Lee & Co. rescinded the two agreements on 10 April 1990.

Based on the aforesaid undisputed facts Counsel for the plaintiff submitted that the plaintiff was entitled to obtain summary judgment on the grounds that:

(a) the defence of the defendants was a sham defence.

(b) there was a fundamental breach of two agreements by the defendants.

(c) alternatively the two agreements had been avoided by the doctrine of frustration.

He also contended that the Land Sale Agreement and the Share Sale Agreement were related to one transaction, that is, the sale of the properties and sale of the shares were interdependent on each other. There was an orally expressed or implied term that the Share Sale Agreement was subject to the Land Sale Agreement and that it would determine if the Land Sale Agreement should be terminated by reason of the default of the 3rd defendant.

Although the Counsel for the plaintiff had put up a comprehensive and useful written submission with authorities to support the application of the plaintiff for summary judgment, I do not with due respect, propose to set out the contents of his written submission as I shall be referring to some of the relevant points raised by him and the authorities cited by him in his written submission later in this judgment.

Turning to the defence, Counsel for the defendants too had put up a comprehensive and useful written submission supported by authorities. Again, with due respect, I do not propose to set out his submission. I need only give an outline of his submission at this stage as I shall be referring to the more pertinent points of his submission later in this judgment.

Counsel for the defendants firstly submitted that the defendants refuted the assertion of the plaintiff that the Land Sale Agreement and the Share Sale Agreement were interdependent and related to one transaction. The next important point raised by him was that as the application of the plaintiff for summary judgment "includes" a claim (whether in the alternative or not is of no import) based on fraudulent misrepresentation, the plaintiff is not entitled to obtain summary judgment by virtue of O. 14 r. 1(1)(b) of the RHC which says that an application for summary judgment under that order is not applicable to an action, which includes a claim by the plaintiff based on an allegation of fraud.

In any event even, assuming (so submitted by Counsel) that the Court could consider the causes of action based on the claims of breach of contract and frustration, Counsel for the defendants contended that the application of the plaintiff for an O. 14 judgment was premature because as at the date of filing the present action of the plaintiff on 18 April 1990 the completion date of the Land Sale Agreement had not expired yet - the expiry date for the handing over of vacant possession of the properties was to take place only on 18 April 1990. Furthermore, the plaintiff's solicitors were notified by the defendants' solicitors that the application to set aside the *ex parte* injunction obtained by Golden Scoope had been filed by the defendants in civil suit S6-22-102-1990 and was fixed for hearing on 18 April 1990. There was always the possibility that the injunction would and could in fact be set aside on that date being the last day of the completion of the Land Sale Agreement. Yet the plaintiff elected to rescind the Land Sale Agreement without waiting for the outcome of the application of the defendants to set aside the said *ex parte* injunction. Thus the plaintiff in giving notice to rescind the said agreement, was himself repudiating the said agreement on 16 April 1990. By this action of the plaintiff the obligation of the 3rd defendant to deliver vacant possession of the properties would in any event be postponed indefinitely by the operation of s. 52 of the Contracts Act 1950 which reads:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Counsel also contended that the 3rd defendant had not accepted the plaintiff's purported rescission of the said agreement. Conversely by the premature rescission, the plaintiff had disabled himself from proceeding further and had unequivocally manifested a complete absence of readiness and willingness to perform which was a crucial element in the concept of anticipatory, breach, which concept the plaintiff placed heavy reliance on. The application of the 3rd defendant in Civil Suit S6-22-102-1990 to set aside the *ex parte* injunction had not been able to proceed because of, *inter alia*, the retirement of the trial Judge.

As the forefront of the defendants' defence is that the plaintiff is precluded from obtaining a summary judgment pursuant to O. 14 of the RHC since his action is based on an allegation of fraud, I shall firstly deal with this issue. Under O. 14 r. 1(2) it is provided that:

Subject to para. 3, this rule applies to every action by writ other than:

(b) an action which includes a claim by the plaintiff based on allegation of fraud, or

O. 14 r. 1(2) of RHC is worded the same as O. 14 r. 1(2) of the English Rules of Supreme Court 1965. It would seem that in England the rule was retained as a consequence of s. 6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933 which provides:

> Subject as hereinafter provided, if, on the application of any party to an action to be tried in the King's Bench Division of the High Court made not later than such time before the trial as may be limited by rules of Court, the Court or a Judge is satisfied that:
>
> (a) a charge of fraud against that party; or
>
> (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, is in issue, the action shall be ordered to be tried with a jury unless the Court or Judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury; but, save as aforesaid, any action to be tried in that Division may, in the discretion of the Court or a Judge, be ordered to be tried either with or without a jury.

However in Malaysia there is no similar provision for trial by jury in civil cases and therefore there is no reason that exists at all for the retention of O. 14 r. 1(2)(b). Nonetheless as the rule is included in O. 14 I cannot ignore it regardless of my personal view. But in order that a defendant can claim the exception under O. 14 r. 1(2)(b) it must be shown that the claim of the plaintiff based on a charge of fraud must mean "deceit", that is, "a false representation made knowingly or without belief in its truth or recklessly and carelessly, whether it be true or false" (per judgment of Lord Herschell in *Derry v Peek* [1889] 14 App. Cas. 337 at 374). Lord Herschell's proposition was adopted in *Barclays Bank Ltd. v. Cole* [1967] 2 QB 738 where Lord Denning MR said at p. 744:

> Likewise in law "fraud" is proved when it is shown that a false representation has been made knowingly without belief in its truth, or recklessly carelessly whether it be true or false: see *Derry v. Peek*, per Lord Herschell. In any case, "fraud" involves a false representation.

Lord Diplock in the same case agreed with the said proposition in the following passage of his judgment at pp. 744-745:

> If the expression "a charge of "fraud" has a special meaning in this context as a term of art, that special meaning must be ascribed to it. I think it has. For at least 100 years (see Bullen & Leake's, Precedents of Pleadings, 3rd Edn. (1868)) "fraud" in civil actions at common law, whether as a cause of action or as a defence, has meant an intentional misrepresentation (or, in some cases, concealment) of fact made by one party to act upon it, which does induce the other party to act upon it to his detriment.

A more recent English case which deals with the scope of O. 14 r. 1(2)(b) is *Newton Chemical Ltd. & Ors. v. Arsenis* [1989] 1 WLR 1297 (a case relied by the plaintiff in this action). Briefly the facts of this case are that in 1984 the plaintiffs, manufacturers of toiletry products had engaged the defendant as self-employed sales representative and had paid him on a commission basis. In 1987 the plaintiffs discovered that the defendant had been fabricating orders from retail chemists and they commenced proceedings against him for repayment of commission and for sums in respect of bonus goods. In subsequent criminal proceedings in respect of those matters, the defendant pleaded guilty to a number of charges of false accounting contrary to s. 17(1)(a) of the Theft Act 1968. Although the allegation made by

the plaintiffs in their statement of claim against the defendant were based solely on his breaches of contract and fiduciary duty and his negligence, it contained one paragraph that is, para. 6(8) which reads:

> The defendant submitted divers claims for commission and received and/or accepted payment of commission from the first plaintiffs in respect of the purported orders which were not genuine and/or were wholly or partly fabricated by the defendant and/or where: (i) no sale of such products was, in fact, made; and/or (ii) the numbers and/or value of such products actually sold was less than the amount and/or value thereof appearing on invoices and/or sales reports submitted and/or made up by the defendant. (*ibid* at p. 1301).

Apparently based on that pleading, the defendant resisted the summons for summary judgment taken out by the plaintiffs on the ground that the plaintiffs' statement of claim "was based on an allegation of fraud against him" and they were accordingly precluded under O. 14 r. 1(2)(b) from obtaining summary judgment. The Judge on hearing of the summons upheld the defendant's case and refused the plaintiffs' application. The matter then moved on to the Court of Appeal. It was contended at the Court of Appeal that the said paragraph contained all the necessary ingredients of *Derry v. Peek* fraud: by submitting claims for commission on fabricated orders, the defendant made to the plaintiffs a representation which the defendant knew to be untrue, and he intended the plaintiffs to reply and act on that representation and the plaintiffs did rely on that representation by paying the commission claim. Furthermore para. 6(8) of the statement of claim and also para. 6(9), which made like allegations regarding claims by the defendant for reimbursement of expenses were followed by a reference for further particulars to two affidavits where the words "fraud" and "fraudulent" were used to describe the defendant's conduct. That being so, the argument continued, the action came within O. 14 r. 1(2)(b) even though the plaintiffs have chosen not to put forward a claim for damages for the tort of deceit. Nicholls LJ rejected the propositions raised by the defendant's Counsel and held that paras. 6(8) and 6(9) regarding "the submission of false claims for commission and expense are allegations of breaches of contract, breaches of fiduciary duty and breaches of duty of care". In short what His Lordship said was that the allegations of false claims for commission or expense were allegations **in support** of the plaintiffs' allegations or claims for breaches of contract, breaches of fiduciary duty and breaches of duty care.

Reverting to the present case let us examine the relevant part of the averments of the plaintiff in his statement of claim concerning the Land Sale Agreement.

In para. 3.2 of his amended statement of claim the plaintiff cited the various express terms of the Land Sale Agreement which I have produced earlier. He then went on to say:

> The 3rd defendant by its servant or agent and/or the 1st and 2nd defendants should disclose to the plaintiff all material facts affecting the title to the said properties or the price of the said properties.

In para. 7 of his statement of claim he claimed:

> In breach of the several terms of the 1st Sale Agreement as set out in para. 3.2 above the defendants:
>
> (a) were unable to complete the sale of the said properties on or about 18 April 1990 by reason of the interim injunction dated 12 March 1990 issued by the High Court of Kuala Lumpur and obtained by one Golden Scoope Sdn. Bhd. (hereinafter referred to "as Golden Scoope") such disability being caused by the default of the defendants under the 1st Sale Agreement.

(b) were unable at all material times (to) deliver to the plaintiff the said properties free from encumbrances and with vacant possession as the defendants had an existing tenancy arrangement with Golden Scoope as from 23 November 1989 and that the said properties are at all material times subject to a development order dated 31 October 1989 made by the Dewan Bandaraya Kuala Lumpur under the Control of Rent Act 1966, which fact was not made known to the plaintiff at the relevant times.

(c) **failed to disclose the said tenancy agreement with Golden Scoope and/or such claims of Golden Scoope and the said development order or notice dated 31 October 1989 from the Dewan Bandaraya, Kuala Lumpur.**

Then in para. 8 the plaintiff went on to claim:

> Further and/or in the alternative the 1st Sale Agreement in frustrated by the legal suit of Golden Scoope against the 3rd defendant *vide* Kuala Lumpur High Court Suit No. S6-22-102-1990 and in particular the interim injunction dated 12 March 1990 obtained therewith against the 3rd defendant which restrains the 3rd defendant its servant or agents from "selling disposing renting transferring or in any way dealing" with the said properties.

It is only in paras. 9.1 to 9.4 that the plaintiff prayed in the alternative that the 3rd defendant misrepresented to him that he could put up whatever building he liked on the properties failing to reveal to him that the properties were subject to a development order dated 31 October 1989 issued by Dewan Bandaraya Kuala Lumpur under the Control of Rent Act 1966 and that there was an existing tenancy arrangement with Golden Scoope on 23 November 1989. It is in para. 9.4 that the plaintiff for the first time alleged that the 1st defendant fraudulently made the representation knowing them to be false or made recklessly not caring whether they were true or false.

From his statement of claim the plaintiff has three causes of action based on his claim of breaches of the Land Sale Agreement frustration of the said agreement and claim founded on fraud. However that may be, the first two causes of action based on the claims of breaches of the Sale Agreement and frustration of that agreement relied on by the plaintiff do not include the ingredient of *Derry v. Peek* fraud. To succeed in his claim for breaches of the said agreement all the plaintiff has to do is to establish that the defendants have committed a breach of one or more of the fundamental terms of the said agreement. Likewise in alleging frustration of the said agreement all is required of him is to establish that the said agreement has been frustrated by an intervening event. Strictly on the first two pleaded causes of action, it will be sufficient if the plaintiff proves that however the claims came to be made, the 3rd defendants were unable or disabled themselves to deliver to the plaintiffs the properties free from encumbrances on or before the stipulated time of delivery of vacant possession, that is, by 18 April 1990 provided the plaintiff was at the material time able and willing to perform his part of the bargain namely to pay the full purchase price. It is true that in subpara. (c) of para. 7 of the statement of claim the plaintiff had alleged that the defendants had failed to disclose the tenancy agreement with Golden Scoope and the DBKL's development order or the DBKL's notice of 31 October 1989. That subparagraph cannot be construed as an allegation of fraud within the meaning as laid down in *Derry v. Peek*; it merely fortified the plaintiff's claim that because of the said tenancy agreement and the said development order and notice, the 3rd defendant was not able to deliver vacant possession of the properties as the encumbrances caused by the tenancy agreement and the DBKL's order and notice prevented them from doing so. It is also true that in paras. 9.1 to 9.4 the plaintiffs pleaded that the 1st defendant acting on behalf of the 3rd defendant made representation to him which were false or which were made recklessly not caring whether they were true or false.

Such allegations no doubt fall within the *Derry v. Peek* fraud. But at the hearing of the plaintiff's application Counsel for the plaintiff said quite clearly in his submission that the plaintiff would abandon such a claim of fraud. In other words the plaintiff would not rely on the alleged misrepresentations purportedly made by the 1st defendant to support his application, for summary judgment under O. 14 of the RHC. There is no legal inhibition against the plaintiff's abandonment of his pleadings of misrepresentation for summary judgment so long as he does not attempt to utilize directly or indirectly the misrepresentation to support his case. I should also mention that in the Singapore case of *Blue Nile Co. Ltd. v. Emery Customs Brokers (S) Pte. Ltd.* [1990] 2 MLJ 385 it was held that where a claim was one based on fraud in the technical sense with the ingredients of the tort of deceit as used in *Derry v. Peek* the plaintiff could not rely on O. 14 r. 1(2)(b) of the Singapore Rules of the Supreme Court 1970 to get summary judgment. That case however is distinguishable in that the causes of action as pleaded in the statement of claim read as follows:

> 7. The defendants at the time when they issued or caused to be issued the said first, second and third bills of lading knew and/or ought to have known that the said representations contained therein were untrue and/or were made recklessly not caring whether they were true or false.
>
> 11. Further and/or alternatively, at the time when the said representations were made, the defendants well knew or ought to have known that the plaintiffs would rely on the said representations and would be induced thereby to accept the said first, second and third bill of lading under the said letter of credit.
>
> 12. In the premises, the defendants were under a duty to take care in the making the representations.
>
> 15. In breach of the said duty, the defendants were negligent in making the representations.

From the pleadings in that case, it is clear that the main cause of action of the plaintiffs was based on the *Derry v Peek* fraud. In the alternative pleading of negligent misstatement it was held that the allegation of negligence could not succeed as the defendant had in their pleadings succeeded in raising triable issues against their claims.

From the above discussions I am satisfied that the plaintiff cannot be precluded from applying for summary judgment pursuant to O. 14 of RHC in respect of his first two causes of action based on breaches of the Land Sale Agreement and frustration of the said agreement.

The next question is whether the plaintiff has made out a case which is virtually uncontested. In support of his causes of action based on the claims of breaches of the Land Sale Agreement and frustration of the said agreement, the plaintiff is relying on the fact that the 3rd defendant was not able to deliver vacant possession of the properties by 18 April 1990 because of

(a) order of DBKL approving the conversion of the land use of the properties from partial commercial purpose to fully commercial purpose and the notice requiring the new two-storey building to be constructed on or before 30 April 1990; and

(b) the tenancy agreement entered into by the 3rd defendant with Golden Scoope whereby the 3rd defendant agreed to let out the ground floor of the new building to be built on the properties to Golden Scoope;

(c) the interlocutory injunction obtained by Golden Scoope restraining the 3rd defendant their agents or servants from selling, disposing, renting transferring or in any way deal with the ground floor of the properties.

The plaintiff therefore claimed that based on these three grounds, the 3rd defendant was in breach of the Land Sale Agreement and/or the said agreement had been frustrated and he had the right to rescind the said agreement particularly when he was at all material times able and willing to perform his part of the bargain, that is, to pay the full purchase price. His claim regarding his ability to pay the full purchase price had not been challenged by the defendants.

Turning once again to the three grounds I am satisfied that the 3rd defendant had raised a triable issues as regards to ground (a) concerning the DBKL order and notice and I say so for these reasons. Although the plaintiff in his affidavit (encl. 3B) in support of his application for summary judgment said that he was completely unaware of the DBKL order and notice until after he had signed the Land Sale Agreement, the 3rd defendant on the other hand in an affidavit (encl. 13) affirmed by the 1st defendant, who was, and I believe still is the director of the 3rd defendant contended that the 1st defendant attended a meeting on 12 January 1990 at the 3rd defendant's office with the plaintiff together with his interpreter and solicitor. At the meeting the plaintiff was made to understand the contents of the order and notice of DBKL. Indeed the plaintiff had paid a sum of RM111,024 to the previous tenants of the properties to enable the conversion of use of land to be approved by DBKL and the consequential displacement of the tenant who had previously resided in the rent controlled premises on the properties. Based on these conflicting affidavit evidence, ground (a) relied on by the plaintiff cannot possibly be resolved at this interlocutory stage.

As to ground (b) and (c) concerning the tenancy agreement of Golden Scoope and the interlocutory injunction obtained by them, there is no doubt that the 3rd defendants had entered into a tenancy agreement with Golden Scoope to let out the ground floor of the new building which was to be built on the properties. They even showed the plans of the internal layout of the proposed tenanted premises and Golden Scoope suggested certain alterations to be made to the plans. More surprisingly is that the 3rd defendant had admitted that they did receive a security deposit for the tenancy from Golden Scoope payable to a firm of solicitors as stakeholder (see Exhibit TCC6 of encl. 13). The 3rd defendant now turns round and says that the agreement in the form of a letter was "understood" to mean that it would be subject to a formal contract setting out the relevant terms and conditions of the tenancy. If that be so he should produce the said letter for sight of the Court. In failing to do so I cannot accept their bare words, particularly when the plaintiff had managed to produce a copy of the draft tenancy agreement containing all the essential terms of the tenancy which had been signed by Golden Scoope and their guarantors and it was stated that the said tenancy agreement was irrevocable. It was based on this tenancy agreement that Golden Scoope has sued the 3rd defendant for specific performance. Not only had the 3rd defendant failed to rebut this tenancy agreement, they even made on attempt to rebut it but rather chose to rely on a purported earlier letter which they had never produced. In the circumstances s. 114 of the Evidence Act 1950 would adversely apply against them.

There is equally no doubt that the tenancy agreement entered between the 3rd defendant and Golden Scoope was made behind the back of the plaintiff - he knew nothing about it until late March 1990 when Peat Marwick, apparently the plaintiff's financial advisers, caused a search to be made with the Court and the plaintiff was told about the tenancy suit filed by Golden Scoope and the injunction obtained by them on 12 March 1990 against the 3rd defendant. On receipt of this information, the plaintiff therefore instructed his solicitors, who duly did so, to rescind the Land Sale Agreement as well as the Share Sale Agreement effective from 10 April 1990.

Now having sold the properties to the plaintiff, the 3rd defendant had no right to enter into a tenancy agreement with Golden Scoope without the knowledge of the plaintiff to let out the ground floor of the new building, which had yet to be constructed on the properties. In doing so clearly the 3rd defendant disabled themselves from delivering of vacant possession of the properties to the plaintiff under Clause 2(iii) which I have set out earlier.

Counsel for the defendants in his submission opposing grounds (b) and (c) relied on by the plaintiff contention that the plaintiff's solicitors were notified by the defendants' solicitors that the application to set aside the injunction in K.L. High Court Suit S6-22-106-1990 was fixed for hearing for 18 April 1990. There was always the possibility that the injunction would and could in fact be set aside on that day (18 April 1990) which was also the last day for completion under the Land Sale Agreement. The rescission of the agreement by the plaintiff was therefore premature in that at the time of rescission, it could not be said with any degree of certainty that the defendants would clearly fail to deliver vacant possession. The element of anticipatory breach relied on by the plaintiff could not apply. In fact the conversion was the case. The plaintiff was himself repudiating the agreement and by virtue of s. 52 of the Contracts Act 1950 which reads:

> When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

It was clear that the 3rd defendant need not perform their promise if the plaintiff who simultaneously had to perform a reciprocal promise was not ready or willing to do so.

Counsel cited the case of *Caltex Oil (M) Sdn. Bhd. v. Ho Lai Yoke* [1964] MLJ 30 to support his contentions. I shall consider the principles laid down in this case later. For this reason the delivery of vacant possession was indefinitely postponed by operation of the said s. 52.

With due respect Counsel for the defendants in his submission had inadvertently overlooked the provision of s. 40 of the Contracts Act 1950 which reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put to an end to the contract, unless he had signified, by words or conduct, his acquiescence in its continuance.

From the indisputable facts of this case, the 3rd defendant had even before the execution of the Land Sale Agreement with the plaintiff, entered into an agreement to let out the ground floor of the building yet to be built on the properties to Golden Scoope for a period of 3 years with an option to extend the tenancy. This by itself clearly shows that the plaintiff would not be able to obtain vacant possession of the properties by 18 April 1990. The defendants' argument that the said tenancy agreement had no lawful effect because it was subject to a formal agreement to be executed later is irrelevant. The fact that they had executed a tenancy agreement based on which Golden Scoope had instituted an action for specific performance of the same and the suit has yet to go on trial is indicative that the 3rd defendant would and could never be able to give vacant possession of the properties without any encumbrance to the plaintiff particularly when Golden Scoope had obtained an interlocutory injunction against the 3rd defendant from selling disposing etc. of the said properties to a third party. The 3rd defendant had therefore disabled themselves from performing their obligation under Clause 2(iii) of the Land Sale Agreement when the plaintiff was willing and able to pay the full purchase price by the date of completion, that is, 18 April 1990. Thus it is said in *Universal Cargo Carriers Corporation v. Citati* [1957] 1 QB 401 at 435:

The law on the right to rescind is succinctly stated by Lord Porter in *Heyman v. Darwins Ltd*. as follows:

> The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance.
>
> The third of these is the ordinary case of actual breach, and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes. A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must "evince an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.

Again at p. 441 it is said:

> A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power by his own act or default circumstances to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof.

As to the case of *Caltex Oil (Malaya) Ltd. v. Ho Lai Yoke* (*supra*) relied on by the defendants the said case has no application to the present case for in that case the defendants themselves were unable to perform their obligations and rescinded the contract on the ground that the plaintiffs were unwilling to perform their part of the agreement which the Court found was not true. A passage from the judgment of the *Caltex* case is useful and should be cited:

> As to the first ground, I have no hesitation in saying that in my opinion Clauses 4 and 5 (set out in full at the beginning of this judgment) were reciprocal promises intended to be simultaneously performed within the meaning of s. 52 of the Contracts (Malay States) Ordinance 1950. For my own part I shall need unambiguous express terms before reading into any contract for the sale and purchase of land in Malaya **a stipulation that payment is a condition precedent to execution of transfer, contrary to well established practice.** (Emphasis is mine).

The aforesaid passage suggests that a vendor must be able, willing and ready to execute a transfer of the land before the purchaser is required to pay up the full purchase price. In the present case the plaintiff has in his affidavit affirmed on 4 May 1990 (encl. 3B) asserted that at all material times he had the funds and monies in Malaysia to make payment of the balance of the purchase price under the Land Sale Agreement.

To make matter worse, Golden Scoope had succeeded in obtaining an interlocutory injunction restraining the 3rd defendant from doing the things as stated earlier with regard to the properties. The injunction has the effect of frustrating the Land Sale Agreement pursuant to s. 57(2) of the Contracts Act 1950 which reads:

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason or some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

I had occasion to deal with the issue of frustration in my judgment in the originating summons case S7-31-3903-88 *Standard Chartered Bank v. Kuala Lumpur Landmark Sdn. Bhd.* [1991] 1 CLJ 801.

In that case I adopted the principle laid down by the Supreme Court of India in the case of in the matter of *H.E.H. The Nizam's Jewellery Trust* [1980] AIR SC 17 and an Australia High Court case of *Codelta Construction Pty. Ltd. v. State Rail Authority of New South Wales* [1982] 41 ALR 367. The principle shortly put is that when two parties had entered into a contract to do certain thing pursuant to the terms and conditions of the contract and subsequently a third party succeeded in obtaining an injunction against one of the contracting party restraining him from carrying out his fundamental obligation or obligations under the contract, the result is the frustration of the contract and the innocent party to the contract need not perform his contractual obligations. In the present case Golden Scoope was granted the injunction on 12 March 1990 and it was a term in the Land Sale Agreement that the completion date when the plaintiff was to pay the balance of the purchase price and the 3rd defendant to deliver vacant possession of the properties was 18 April 1990 and time was the essence of the said agreement. Under such circumstances it is my considered opinion that the plaintiff acted reasonably and properly to rescind the Land Sale Agreement on 10 April 1990. The 3rd defendants, however, contended that as their solicitors had given notice to the plaintiff they had applied to set aside the injunction and that their application was to be heard on 18 April 1990, and the plaintiff should have waited until the hearing of their application before rescinding the said agreement. The 3rd defendant claimed that there was a possibility of their succeeding in persuading the Court to vacate the injunction. To my mind almost everything is possible but the element of possibility is not a defence in a civil or criminal case. Bearing in mind, that the plaintiff is an innocent party and it is the 3rd defendant themselves who gave cause for Golden Scoope to file a suit against them and obtained the injunction, it is only proper that the plaintiff should take step to safeguard himself. As it is, the injunction has not been revoked, even up to today!

There is therefore no doubt that the plaintiff has clearly established that he is entitled to rescind the Land Sale Agreement for two reasons *vis* (i) breach of the agreement on the part of the 3rd defendant by entering into an agreement to let out the ground floor of the premises yet to be built on the properties and (ii) the injunction order preventing them from carrying into completion the said agreement. The 3rd defendant had absolutely no defence to the claim of the plaintiff to rescind the said agreement.

It is to be noted that so far I have been considering only the Land Sale Agreement. I have not dealt with the Share Sale Agreement. In his assertion, in his statement of claim the plaintiff said that the Share Sale Agreement was an integral part of the Land Sale Agreement and on this point his averments are as follows:

> 5.1 It was orally agreed between the parties at the material time that the 2nd Sale Agreement was in verity part of the 1st Sale Agreement and was entered into for the purpose of the sale of the said properties and accordingly it was orally agreed between the parties that:
>
> (a) the RM1,600,000 paid by the plaintiff to the 1st and 2nd defendants was for the purchase of the said properties.
>
> (b) in the event the sale of the properties could not be completed by the defendants or any one of them for whatever cause or reason, the 1st and 2nd defendants shall repay to the plaintiff the sum of RM1,600,000.

5.2 Alternatively it was *inter alia* an implied term of the 2nd Sale Agreement that:

(a) the said agreement is subject to the condition that there be a sale of the said properties under the 1st Sale Agreement.

(b) in the event the 1st Sale Agreement is terminated by reason of default of the 3rd defendant for whatsoever cause or reason the 2nd Sale Agreement is also determined and the sum of RM1,600,000 shall be repaid to the plaintiff.

5.3 Pursuant to the matters stated in paras. 5.1 and 5.2, the said solicitors prepared a memorandum of understanding on or about 5 March 1990 at the request of the plaintiff and the 1st and 2nd defendants acting by themselves and/or behalf of the 3rd defendant and the said memorandum was approved by the plaintiff, his servant or agent but was refused approval by the defendants.

In his affidavit (encl. 3B) the plaintiff asserted that he was given to understand by the solicitors who dealt with the transaction of the sale of the properties, the 1st defendant and one Datuk Hui Guan, the agent who arranged for the sale of the properties that the sale of the properties would involve an additional sale of a company belonging to the 1st defendant to overcome the requirement of obtaining the Foreign Investment Committee (FIC) approval. The plaintiff agreed as he trusted the said solicitors, the 1st defendant and Datuk Hui. The plaintiff also said he did not know what the FIC was and its function nor its guidelines and policy. In any event the plaintiff believed it was an understanding of all parties concerned that the subject matter of the sale under the two Sale Agreements were the said properties and for a total consideration of RM6.5 million. It was for this reason that the said solicitors prepared a memorandum of understanding on 5 March 1990 but the 3rd defendant had not approved the said memorandum.

In their reply the 3rd defendant denied that there was an understanding amongst all parties concerned that the Land Sale Agreement and the Share Sale Agreement were linked and of which performance was interdependent. The memorandum of understanding referred to the 3rd defendant was never executed and in any event it was prepared well after the two agreements were signed. They also denied that the sale of the Win Dollars Sdn. Bhd. was designed at evading the FIC approval.

On this issue it is to be noted that although the Land Sale Agreement and Share Sale Agreement were executed on the same date namely 19 January 1990 yet there is nothing either in the Land Sale Agreement or the Share Sale Agreement to indicate that the two were linked and of which performance was interdependent. At this interlocutory stage it is difficult if not impossible to resolve this issue. It might well be true that it is very strange that the plaintiff would have bought a RM2 company for RM1.6 million but from a reading of the Share Sale Agreement one cannot say with any degree of certainty that the said company had no other assets except the properties sold to the plaintiff or any other investments which could be yielding profitable returns. It might well be that the plaintiff bought the shares because of these other assets and investments and/or the goodwill of the business of the company which is the very sap and life of a business of a company without which the business would yield little or no fruit.

As regards to the memorandum of understanding, the fact that it came into existence well after the two said agreements had been executed raises a question as to why was it not made at the time or soon after the execution of the two said agreements. At any rate the 1st defendant had not affixed his signature in it. As to the FIC matter I must confess I do not know what is the requirement of the FIC in relation to a foreigner purchasing land in Malaysia

and what advice did the solicitor dealing with the transaction and Datuk Hui give to the plaintiff. Again this matter cannot be resolved at this summary stage and must go on full trial of the case.

The end result of the above discussions is that I am satisfied that the plaintiff has failed to establish even a *prima facie* case to support his right to rescind the Share Sale Agreement. He is therefore not entitled to summary judgment on this issue.

For the above reasons I shall make the following order:

1. A declaration that the plaintiff had effectively rescinded the Land Sale Agreement dated 19 November 1990 identified in para. 3(1) of the statement of claim.
2. The plaintiff is entitled to be refunded the part payment of the purchase price amounting to RM980,000 and the sum of RM141,024 being payment under Clause 10(iv) of the said Land Sale Agreement.
3. The plaintiff is not entitled to enter summary judgment in respect of the Share Sale Agreement identified in para. 4 of the statement of claim. The issue must go for full trial of the case.
4. The sum of RM980,000 and the sum of RM141,024 mentioned in 2 above shall carry interest at the rate of 8% p.a. from 10 April 1990 (the date of rescission of the Land Sale Agreement) to date of judgment and thereafter at the same rate of interest until realization.

As the plaintiff has partially succeeded in his application, he is entitled to one half of the tax costs to be paid by the 3rd defendant.

Also found at [1991] 3 CLJ 1852